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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY,
Appellant,

VS.

ENVIRONMENTAL PROTECTION AGENCY,
Appellee.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

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BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT ON BEHALF OF PACIFIC LEGAL FOUNDATION

The Pacific Legal Foundation files this brief *amicus curiae* pursuant to Rule 42, having obtained the consent of Appellant Union Electric Company and Appellee Environmental Protection Agency.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for

the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens. Ten of the eighteen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation believes the action of the court below in refusing to consider technological and economic feasibility in a Section 307(b)(1) proceeding under the Clean Air Act will adversely affect the general welfare of the people of this nation. This ruling is squarely in conflict with that of the Fourth Circuit in *Appalachian Power Co. v. Environmental Pro. Agcy.*, 477 F.2d 495 (4th Cir. 1973), and that of the Third Circuit in *St. Joe Minerals Corp. v. Environmental Pro. Agcy.*, 508 F.2d 743 (3d Cir. 1975).

Pacific Legal Foundation considers this case to be extremely significant in that the lower court's decision cripples the ability of private industry to protect public health while also maintaining the ability to meet the public demand for goods and services. Unless this Court of Appeals decision is reversed, consequences will be severe, including forced shutdowns of affected businesses, exposing the country not only to shortages in goods and services, but to an escalation in consumer prices and unemployment.

Pacific Legal Foundation believes that the magnitude of this issue must be fully developed, and to insure this development submits this brief.

OPINION BELOW

The United States Court of Appeals, Eighth Circuit, in an opinion reported at 515 F.2d 206 (8th Cir. 1975) declared that economic and technological feasibility of compliance were not to be considered in evaluating a state implementation plan submitted pursuant to the Clean Air Act Amendments of 1970.

ARGUMENT

I

THE ADMINISTRATOR MUST CONSIDER ECONOMIC AND TECHNOLOGICAL FEASIBILITY OF COMPLIANCE AS RELEVANT FACTORS IN APPROVING OR DISAPPROVING A STATE IMPLEMENTATION PLAN

The Clean Air Act Amendments of 1970[1] required the Administrator of the Environmental Protection Agency (EPA) to prepare a list of all air pollutants which have an adverse effect on public health and welfare and to issue air quality criteria for these pollutants.[2] The Amendments also required the Administrator to promulgate national primary and secondary ambient air quality standards for each air pollutant for which air quality criteria had been issued. Pursuant to these standards, each state is to formulate an "implementation plan" establishing standards for the control within their borders of the sources of pollution.[3] Having adopted a particular mix of emission limitations as its implementation plan, the state

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[1] 42 U.S.C. § 1857, *et seq.* (1970).
[2] 42 U.S.C. § 1857c-3.
[3] 42 U.S.C. § 1857c-5.

must submit the plan to the Administrator. He is then to review it to determine if it meets certain criteria which determine the plan's adequacy. If the plan meets these criteria, the Administrator approves it. Otherwise, he resubmits it to the state for revision.

Among the criteria which must be considered by the Administrator are the economic and technological feasibility of the implementation plan. This was clearly stated by the Fourth Circuit Court of Appeals in *Appalachian Power Co. v. Environmental Pro. Agcy., supra.* In response to the assertion by the EPA that the Administrator need not review the economic or technological feasibility of the plan in exercising his power to approve or disapprove the state plan, the court stated:

> "We take no such narrow view of either our own role in connection with the judicial review of the Administrator's action or of the Administrator's role in evaluating the state plan in connection with his exercise of the power to approve or disapprove." *Id.* at 505.

This reasoning is fortified by the Administrator's own guidelines.[4] The guidelines state:

> "Nothing in this part shall be construed in any manner:
>
> . . . .
>
> "(b) To encourage a state to adopt any particular control strategy without taking into consideration the cost-effectiveness of such control

[4] 40 C.F.R. § 51.2 (1972).

> strategy in relation to that of alternative control strategies.
>
> . . . .
>
> "(d) To encourage a state to prepare, adopt, or submit a plan without taking into consideration the social and economic impact of the control strategy set forth in such plan, including, but not limited to, impact on availability of fuels, energy, transportation, and employment."

Ignoring factors which are set out in EPA's own guidelines as considerations upon which a state plan is to be developed is a clear abdication of the Administrator's duty under the Clean Air Act.

Further support of this argument is found in the very process by which the Administrator evaluates state plans upon submission. The Administrator has utilized an interagency review process, composed of representatives of the Federal Power Commission, the Office of Transportation, the Office of Management and Budget and others. An interagency review committee reviews the aggregate impact of implementation plans.[5] William Ruckelshaus indicated in his testimony before the 1972 Oversight Committee[6] that the interagency review process would be an invaluable asset in determining the availablity of fuels, transportation programs, and public and private sector investment. The Administrator considered this

[5] *Appalachian Power Co. v. Environmental Pro. Agcy.*, 477 F.2d 495, 506 (4th Cir. 1973).

[6] *See Hearings, Senate Subcommittee on Air and Water Pollution, Committee on Public Works,* 92nd Cong., 2d Sess., 230 and 236 (1972).

process so important that he allotted to it half of the time allowed him to approve or disapprove the plan. As was stated in *Appalachian Power Co. v. Environmental Pro. Agcy., supra* at 506:

> "It is inconceivable that these agencies, acting with the Administrator, in determining 'the aggregate impact' of the plans and 'in determining the availability of fuels, transportation programs, and public and private sector investment,' do not consider and evaluate the technological and economic aspects of the plans under review. Nor is such evaluation inappropriate under the Amendments."

If the interagency committee must evaluate economic and technological factors under the procedure established by the Administrator, the Administrator himself must also consider them. Indeed this evaluation is essential to the proper performance of his function under the Clean Air Act Amendments, as economics and technology are relevant factors for evaluation. The Sixth Circuit Court of Appeals undercut any other conclusion by saying in *Buckeye Power, Inc. v. Environmental Pro. Agcy.,* 481 F.2d 162 (6th Cir. 1973):

> "We find the Agency's argument that the technological feasibility, high cost-benefit, and resource unavailability are irrelevant under the 1970 Amendments, devoid of merit." *Id.* at 169.

To ignore the technological feasibility, the cost-benefit, and resource availability verges on the idiotic and absurd for it rejects reality and embraces wishful thinking. It does not advance, but rather, regresses society.

II

APPROVAL BY THE ADMINISTRATOR OF A STATE IMPLEMENTATION PLAN IS ARBITRARY AND CAPRICIOUS IF IT FAILS TO CONSIDER RELEVANT FACTORS—ECONOMIC AND TECHNOLOGICAL FEASIBILITY—AND IS THEREFORE A CLEAR ABUSE OF DISCRETION

Section 307(b)(1) of the Clean Air Act Amendments (42 U.S.C. § 1857h-5(b)(1))[7] provided for judicial review of an Administrator's action in approving or promulgating any implementation plan.

The standard of review applicable is set forth in Title 5, United States Code, Section 706:

> "The reviewing court shall—
>
> . . . .
>
> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
>
> "(B) contrary to constitutional right, power, privilege, or immunity;

---

[7]Section 307(b)(1), Title 42, United States Code, Section 1857h-5(b)(1) (1970), provides that:

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day."

> "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ."

It is well established that the Administrator's approval of a state implementation plan will be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[8]

This Court, in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1972), explained that as part of this "inquiry" it:

> "[M]ust consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416.

Technological feasibility and economic feasibility are relevant factors for the Administrator's consideration. The court in *Getty Oil Company (Eastern Operations) v. Ruckelshaus,* 342 F. Supp. 1006, 1015 (D. Del. 1972), presumed that the review of the action of the Administrator in approving a state plan would inquire whether the plan was "unnecessary, uneconomic, and ill-suited to the accomplishments of the regulatory program," such inquiry being the measuring device to determine whether the approval was arbitrary and unreasonable. On appeal, this construction of the court's scope of review was accepted as authorizing judicial review on the grounds that the approval was "arbitrary and unreasonable" and that, in

[8] *Commonwealth of Pa. v. Environmental Protection Agcy.,* 500 F.2d 246, 250 (3d Cir. 1974).

considering such grounds, "questions of economic hardship or lack of compelling necessity" could be considered.[9] *Getty Oil Company (Eastern Operations) v. Ruckelshaus,* 467 F.2d 349, 355, 357 (3d Cir. 1972).

The Missouri Implementation Plan will clearly have devastating economic and social impact. Union Electric Company operates three coal-burning electric power plants in the St. Louis area. Sulfur dioxide is a by-product of burning the coal to generate electricity. The Missouri plan has promulgated such restrictive limitations for sulfur dioxide emissions that Union Electric is faced with the impossibility of compliance. Technologically the limitations cannot be met, and in the alternative the cost of installing particulate removal equipment such as Scrubbers is so high in relation to the benefits that the public interest would be adversely affected by their installation.[10]

The alternative is to shut down the plants. Such action will have far reaching adverse social and economic impact. It is well documented that electricity demand tracks unemployment levels closely.[11] Electricity shortages will force reductions in employment. Such constraint should be avoided as a national policy.

[9] *See also Appalachian Power Co. v. Environmental Pro. Agcy., supra.*

[10] *Union Electric Co. v. Environmental Pro. Agcy.,* 515 F.2d 206, 209 n.6 (8th Cir. 1975).

[11] C. Starr, *A Strategy for National Electricity Production* (July 10, 1975) [hereinafter cited as *Starr*].

Less restrictive limitations which would permit feasible controls would have the effect of balancing environmental protection with job protection and could still meet national standards. The plan therefore exceeds the scope of Title 42, United States Code, Section 1857g(a), which allows the Administrator only "to prescribe such regulations as are necessary." Regulations which would shut down three major electricity generating plants with the results being shutdown of industries dependent upon the electricity, business failure, economic recession and crippling unemployment are not necessary or reasonable. The approval of the implementation plan is an abuse of administrative discretion and in violation of the law. It must be struck down because it is not the result of "reasoned decision-making."[12]

III

APPROVAL OF AN IMPLEMENTATION PLAN WITHOUT CONSIDERING ECONOMIC AND TECHNOLOGICAL FEASIBILITY VIOLATES THE CLEAN AIR ACT

Approval of an implementation plan without considering economic and technological feasibility violates the Clean Air Act in that it:

1. Fails to promote the public welfare and the productive capacity of this nation;

2. Fails to consider the reasonable availability of control measures;

[12] *Essex Chemical Corporation v. Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973).

3. Fails to consider the feasibility of the implementation plan.

A

Failure to Promote Productive Capacity

The Missouri Implementation Plan subverts the very purpose of the Clean Air Act. The opening section of the Act states that one of its purposes is:

> "(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the *productive capacity of its population* . . . ." 42 U.S.C. § 1857(b) (emphasis added).

Obviously, regulations which force the shutdown of energy sources do not promote the productive capacity of the population. Indeed the converse is true.

Total energy consumption tends to roughly parallel Gross National Product (GNP). This relationship arises from the elemental fact that the combination of labor, capital equipment and energy creates goods and services.[13] Even food production is heavily dependent on energy input. GNP and energy use are thus closely linked.[14]

B

Failure to Specify "Reasonably Available" Control Measures

The regulations of the implementation plan further violate the Clean Air Act because they do not set

[13] *Starr* at 6.
[14] *Starr* at 2.

forth programs for achieving air pollution control standards which are "reasonably available." *See, e.g.,* 42 U.S.C. § 1857c-5(e).

They are not reasonably available first because the particulate removal equipment (Scrubbers) has not been technologically devised to operate successfully and satisfactorily.[15]

Secondly, even if the present technology were available, its cost is so disproportionate as to render such installation unreasonable, for under such circumstances control measures are not "reasonably available." This standard was affirmed in *State of Texas v. Environmental Pro. Agcy.,* 499 F.2d 289 (5th Cir. 1974), which held:

> "[T]he agency may not force a state to adopt measures needed during the 1975-1977 period merely because they are available, but only if they also are reasonable." *Id.* at 313.

In this instance, to install the presently available equipment would require a capital expenditure of over $500 million for all of Union Electric's plants. Such an expenditure on equipment not designed to promote productivity is economically unreasonable and cannot be rationally justified.

Given the edict to meet the promulgated emission limitations, Union Electric may have no choice but to close its doors. Such an event certainly would not be in the public interest.

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[15] *Union Electric Co. v. Environmental Pro. Agcy., supra* at 209 n.9.

C

Failure to Approve a Plan Which Will Achieve National Primary Ambient Air Quality Standards As Expeditiously As Practicable

The Clean Air Act itself required the EPA Administrator to review the feasibility of an implementation plan. The Administrator is directed to determine whether an implementation plan provides for the attainment of primary ambient air quality standards "as expeditiously as *practicable*"[16] (emphasis added). The Third Circuit, in *St. Joe Minerals v. Environmental Pro. Agcy.,* 508 F.2d 743 (3d Cir. 1975), reasoned that:

> "These temporal qualifications suggest that in considering an implementation plan the Administrator should evaluate the workability of the proposed limitations." *Id.* at 748.

A plan which cannot be met because of technological infeasibility and prohibitive cost is certainly not practicable nor is it workable. If standards cannot be met under the current mix due to technological and economic infeasibility, the national ambient air quality standards cannot be met as expeditiously as practicable. To promulgate such a plan regardless of these known facts violates the basic tenets of the Clean Air Act and cannot stand.

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[16] 42 U.S.C. § 1857c-5(a)(2)(A).

IV

AS A FUNCTIONAL EQUIVALENT OF AN ENVIRONMENTAL IMPACT STATEMENT THE IMPLEMENTATION PLAN MUST ALSO CONSIDER ECONOMIC AND TECHNOLOGICAL FACTORS

A number of cases[17] have argued that the Administrator in approving a state implementation plan must file an Environmental Impact Statement pursuant to the dictate of the National Environmental Policy Act of 1969 (NEPA).[18] The courts have consistently held that the EPA need not file an Environmental Impact Statement because sufficient provisions are contained within the Clean Air Act to achieve the goals sought to be achieved by NEPA.

It is well settled that the purpose of NEPA is to insure that in a major federal project, consideration is not only given to the economic and social ramifications of the project but also to the environmental ramifications.

It must be emphasized that the purpose of NEPA is not to exalt the environment over equally important economic and social considerations. As Judge Wright stated in *Calvert Cliffs' Coord. Com. v. United States A. E. Com'n,* 449 F.2d 1109 (D.C. Cir. 1971):

> "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place

[17] *See Appalachian Power Co. v. Environmental Pro. Agcy., supra; Buckeye Power, Inc. v. Environmental Pro. Agcy.,* 481 F.2d 162 (6th Cir. 1973); *Getty Oil Company (Eastern Operations) v. Ruckelshaus,* 467 F.2d 349 (3rd Cir. 1972).

[18] 42 U.S.C. § 4321, *et seq.* (1970).

> along with *other considerations. . . .*" *Id.* at 1112 (emphasis added).

The Administrator can meet the goals of NEPA only if he considers economic, technological, and social factors in a state implementation plan. As was stated above, the purpose of NEPA is to insure a balanced approach to agency level decision-making. The Administrator has failed to meet this mandate by his refusal to consider the economic and technological feasibility of provisions within a state implementation plan. He has asserted that he has authority to only approve the plan if its provisions satisfy the national primary and secondary ambient air quality standards. Such a position can only be described as unreasonable and in contravention of the spirit of NEPA. If the provisions of the Clean Air Act satisfy NEPA as a functional equivalent as the courts have heretofore concluded, it is clear that the Clean Air Act assumes that economic and technological considerations will be balanced by the Administrator with environmental considerations. Anything less subverts the intent of NEPA and must be struck down.

CONCLUSION

The implementation plans which are promulgated pursuant to the Clean Air Act play a major role not only in the protection of public health but also in the protection of public welfare and economic progress. The Administrator of the Environmental Protection

Agency does not recognize this scope of implementation plans, asserting that economic and technological feasibility of the plans are not considerations upon which he may legally approve or disapprove such plans. We contend that not only does the Administrator have the legal authority to consider these factors, but he has the duty to consider these factors and approve or disapprove plans weighing this evidence.

The electric power industry has the responsibility to provide an adequate and reliable source of energy to millions of people totally dependent upon it for power supply both for their homes and their jobs, as well as a responsibility to protect the public health. This public trust can be met only if the Administrator balances economic and technological considerations with environmental considerations, and then acts to approve or disapprove the implementation plan. The Pacific Legal Foundation, as *amicus curiae,* therefore urges the decision of the Court of Appeals to be reversed.

Respectfully submitted,

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